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in the

Supreme Court

of the

United States

October Term 1988

JOSEPH LOVETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS - ELEVENTH CIRCUIT

LAW OFFICES OF
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12 pp

QUESTIONS PRESENTED

Whether the opinion of the United States Court of Appeals for the Eleventh Circuit affirming Mr. Lovett's conviction, so far sanctions a departure by the trial court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision in that

(1) by applying the wrong standard of review, the Eleventh Circuit found no abuse of discretion in the trial court's denial of a continuance to obtain expert voice identification testimony where such continuance was necessitated by the government's providing discovery late, thereby depriving Mr. Lovett of his Fifth Amendment right to due process, a fair trial and to present witnesses and have effective assistance of counsel; and

(2) the time granted for continuance as "one week" was insufficient under the circumstances and did not cure the

government's discovery violation.

PARTIES TO THE PROCEEDING

Joseph Lovett, Jaime Cruz, Pedro Garcia and Lazaro Lopez were indicted, tried and convicted in the Southern District of Florida. Their convictions were affirmed by the Eleventh Circuit Court of Appeals. A fifth defendant, William Jones, was acquitted at trial. Joseph Lovett, Petitioner herein, is the only defendant/appellant who is party to this proceeding.

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OPINION BELOW

The judgment of the United States Court of Appeals, Eleventh Circuit, United States v. Garcia, case no. 87-5733, is reported at 854 F.2d 1280 (11th Cir. 1988). It is a six-page opinion affirming Mr. Lovett's conviction on one count of attempted possession of cocaine with intent to distribute, and sentenced to three years in prison. A copy of this opinion is included at the end of this petition as App. 1-22.

The judgment and sentence of the United States District Court, Southern District of Florida, convicting Mr. Lovett and sentencing him was entered on August 31, 1988.

JURISDICTION

The petition for writ of certiorari is timely filed pursuant to Rule 20.1 of the Supreme Court Rules. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 and Rule 17.1 (a)(c) and Rule 20 of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT

Capital Crimes; double jeopardy, self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Petitioner Joseph Lovett was charged in a two count Indictment with conspiring to possess cocaine with intent to distribute (Count I) and attempting to possess cocaine with intent to distribute (Count II). After trial by jury before the Honorable Sidney Aronovitz in the United States District Court for the Southern District of Florida, Lovett was acquitted of Count I but convicted of the charge of attempted possession.

Subsequent to the verdict, Lovett filed a Motion for a New Trial or for Judgment of Acquittal, which was later supplemented with further argument and an affidavit by Dr. Henry Truby - the defense expert who sought to introduce spectrographic evidence. The original and supplemental motions were both denied.

Following the district court's denial of both motions for new trial, Lovett was duly sentenced to three years imprisonment on August 31, 1987. He timely filed a Notice of Appeal in the 11th Circuit pursuant to 28 U.S.C. 1291 and was allowed to remain on bond pending appeal. On September 14, 1988, the 11th Circuit issued its Opinion affirming his conviction. Following denial of a rehearing, these proceedings ensue.

STATEMENT OF THE FACTS

Lovett was charged in this case as a result of a reverse sting operation conducted on February 10, 1987 by Detective Pablo Garcia of the Coral Gables, Florida, Police Department. At trial, the government's proof consisted wholly of the eyewitness testimony of Garcia, a tape recorded from a body bug worn by Garcia, a transcript of the body bug tape (which included Spanish-to-English translations

where applicable), and currency seized at the scene.

As noted in the panel opinion, counsel for Lovett initially sought to exclude the body bug transcript. The basis for the motion to exclude was a gross irregularity in the compilation and production of the transcripts.

Approximately three weeks after the incident, Garcia took on the task of transcribing the tapes of the body bug that he had worn. Garcia's initial transcript failed to identify any of the speakers other than himself, and only recited the words spoken without attribution to any individual. Even after continual requests by defense counsel for any further discovery, and a reminder from the judge of the prosecutor's obligation, no further discovery came.

Three days before the scheduled trial date, the government directed its

agent to assign names to the statements on tape. The government had simply forgotten its duty to identify the speakers prior.

Garcia testified that in making these voice identifications on the transcript, he relied solely on "voice identification". The entire transaction in which Lovett was allegedly involved had occurred ninety-four days prior, had only lasted twenty minutes, and involved four black American males with similar voice and dialect, along with two latin speakers.

This version of the transcript was not provided to counsel until the morning of the scheduled trial date. An additional version was provided the following day to correct an attribution of the statement "No Seguro" which was initially identified as Lovett's, since Lovett speaks no spanish.

After testimony was taken on the

Motion to Exclude the transcript, Lovett specifically opted out of the motion because the transcript was, in counsel's opinion, completely inaccurate in identifying Lovett as a speaker at all. A continuance was thus sought to obtain an expert's opinion and scientific data which would demonstrate that Lovett did not say anything which was attributed to him. A very brief continuance was granted in order to obtain expert testimony.

On Wednesday, May 20, 1987, counsel for Lovett informed the Court that it was physically impossible for an expert to evaluate the accuracy of the transcripts within the twenty-four hour period granted. Counsel indicated that although she had located a voice identification expert (Dr. Truby) and planned to meet with him that morning, he could not perform his analysis prior to the next morning, because his laboratory

and the equipment needed to perform the analysis was located in Houston, Texas. The test results could not therefore be immediately available. Counsel's motion to continue was denied, but she was informed that she would not however need to present her case until May 26, 1987. This time period was extremely brief in light of the work that needed to be done. It meant that the trial marched foward and, as it turned out, May 26, 1987 was the day of closing as well as the defendant's case. The defendant's request for continuance until May 26, 1987, or until the needed analysis arrived was crucial. Additionally, three of the "extended" days fell over the Memorial Day weekend. Notwithstanding that fact, counsel and her expert worked diligently. (See Affidavit from Dr. Truby, attached to Petition for Rehearing and in the Appendix hereto as App. 23-28)

At trial, Garcia testified that

after arranging a reverse sting sale of cocaine with a co-defendant, he was introduced to Jaime Cruz, Joseph Lovett, William Jones and Samuel Farmer as well as two other individuals who were not charged in this case. Both Lovett and Jones are black American males, as are Samuel Farmer (a co-defendant) and a "Mr. Wright" who was not indicted. Garcia further testified that when he told Jones that he had the "merchandise" (cocaine) with him, Jones then instructed one of the group to go to the pick-up truck which contained the money. Shortly thereafter, someone Garcia believed to be Lovett returned in a red Toyota pick-up truck, and Garcia drove with him to a distance approximately seventy-five feet from the Bronco. There, Garcia testified, "Lovett" removed a panel from the side of the pick-up truck and showed Garcia a plastic bag containing a large sum of currency.

Thereafter, the body bug tape was played for the jury and entered into evidence. The transcript, although provided to the jury to read along, was not itself entered into evidence.

Importantly, throughout cross-examination, where various inconsistencies between his eyewitness recall and the transcript were demonstrated, Garcia deferred to the transcript as a better piece of evidence than his direct recall of the events. The entire incident only took twenty minutes and he had never seen Jones, Lovett, Farmer or Wright before.

Significantly, despite other transcript statements attributed to Jones plus Garcia's eyewitness testimony regarding Jones, (particularly Garcia's specific recollection that Jones instructed Lovett to show the money), counsel for Jones was able to demonstrate a

misattribution on the transcripts as to Jones, and Jones was acquitted of all charges by the jury.

In short, Garcia thus impeached his own eyewitness recollection in favor of the transcripts, and the government's case therefore rested squarely on the body bug tape and the transcript thereof. Further, Garcia himself suggested two times that only an expert could be used to verify his voice identifications.

On the 26th of May, 1987, counsel for Lovett again sought a continuance in order to procure the needed spectrographic evidence regarding the voice identifications made by Garcia. Counsel informed the Court that her expert, Dr. Henry Truby, had sent the body bug tapes to his laboratory in Houston, Texas by Overnight Special United States Mail on Thursday, May 21, 1987. Despite diligent attempts to obtain these tapes on time

through a U.S. government agency, they were not available early in the day on May 26, 1987 - the day of closing. Based on the prior procedure, it appeared that a few more days would be needed to repeat the process. However, moments before closing, counsel for Lovett received a note stating that the lost tapes had been found. Counsel asked the judge for five minutes to check and see when they would be available. That motion was denied. Defendant Lovett was completely without fault in the chain of events which led to the necessity for the continuance. Rather, the government was the culpable party. Had it timely provided the transcript with the voice attributions, counsel for Lovett would have perceived the need for the spectrographic analysis at that time, and would have been able to prepare her defense prior to trial rather than during trial.

Because of the denial of the continuance, Dr. Truby's testimony as to the tape and transcript was limited to the non-specific statement that there were inaccuracies in the contents of the tapes (i.e. mislabled words or phrases, and that, as a whole, the contents had many inaccuracies). Without his comparative voice exemplars, Dr. Truby could not and would not guess, by ear only, on voice identification discreprencies. He could make one exception in a case where the distinction was clear, stating that a certain voice identified as Defendant Jones was not Jones. Jones was subsequently acquitted. As stated in his affidavit attached to Lovett's Motion for New Trial (and attached herewith as well), the spectrographic voice analysis which he finally obtained proved that <u>every single time</u> Garcia's transcript identified the speaker as Lovett, it was <u>not</u> in fact

Lovett's voice that appeared. This fact could not have been independently ascertained by the jury, because Lovett did not testify and the jury had no basis of identification of Lovett's voice but for Garcia's transcript.

Despite this exculpatory evidence that Lovett had been totally misidentified, and the fact that this misidentification had been crucial to his conviction, the Court denied his motion for a new trial. The basis for the denial was the Court's conclusion that Lovett "had ample time to arrange for expert testimony." The denial did not address the fact that the government had caused the delay.

REASONS FOR GRANTING THIS WRIT

THE 11th CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW BECAUSE IT FAILED TO INCORPORATE DISCOVERY VIOLATION CONSIDERATIONS, AND INSTEAD INCORRECTLY APPLIED AN "ADDITIONAL EVIDENCE SUFFICIENT TO CONVICT" ANALYSIS.

The primary issue on appeal was whether the trial court abused its discretion in refusing Lovett's Motion for a Continuance in order to obtain expert testimony to demonstrate the total inaccuracy of Garcia's attribution to him on the transcript, of certain statements on the body bug tape. While general principles regarding the trial court's discretion regarding continuances are relevant, the starting point for appellate review under the unique circumstances of this case was that the continuance was necessitated by the government's negligence in failing to provide discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure in time for defense to make any significant use of it. This is particularly pertinent because a lesser burden is placed on an appellant in order to obtain a reversal on appeal when the error emanates from a governmental discovery violation.

On appeal, Lovett argued that countless cases have suggested minimal remedy for a prejudicial governmental discovery violation is a continuance. See, e.g. United States v. Euceda-Hernandez, 768 F.2d 1307 (11th Cir. 1985):

Among the factors the

> **Court must weigh [in fashioning a remedy] are the reasons for the Government's delay in affording the required discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance.**

Id. at 1312 (emphasis added).

Lovett further argued that the prejudice suffered by a defendant resulting from a discovery violation, is to be measured not so much by whether a different result might have been obtained had the government abided by its discovery duties, but by whether or not defense strategy was affected by the government's failure to provide discovery according to the rules. This standard of review derives from two cases: United States v. Rodriguez, 799 F.2d 649 (11th Cir. 1986), and United States v. Noe, 821 F.2d 604 (11th Cir. 1987). In Rodriguez, the 11th

Circuit reversed a conviction due to an unintentional discovery violation by the government emphasizing that:

> **The purpose of the rule [that statements of a defendant are subject to discovery] is not to punish the Government, as to which intentional conduct would be relevant, but to protect the defendant's right to a fair trial...**

799 at 654.

Again, in Noe, the 11th Circuit reversed a conviction, basing its decision on the denial of the defendant's right to prepare his defense in light of the government's discovery responses:

> **[T]he Federal Rules of Criminal Procedure provide [a defendant] a right to discover all statements that he made to law enforcement officials, and, correspondingly, to devise a defense strategy opn the basis of the evidence enclosed.**

821 F.2d at 608 (footnote omitted)(emphasis added), and explicitly rejected a government-urged application of the harmless error rule which would have required affirmance unless the evidence against a defendant was "not strong", because such a rule would have encouraged "trial by ambush" in derogation of Rule 16. Id. at 608.

In the instant opinion, however, the 11th Circuit completely ignored its own precedent. Neither Noe nor Rodriguez is even mentioned in the opinion. The omission is both confounding and erroneous in view of the fact that the panel recognized that counsel for Lovett had, in fact, changed her defense strategy when the transcript with voice attributions was provided, and the falsity of the identification of Lovett became apparent to her. 854 F.2d at 1284. Instead, the 11th Circuit applied the very kind of analysis

which it had specifically rejected in Noe:

> **We conclude that the nature of the additional evidence sought in this case, considered in light of the overall circumstances[1] presented to the district court, supports the court's denial of the motions for additional continuances.**

Ibid.

In short, the panel applied the general standard of review for denials of continuances, rather than analyzing the exercise of the trial court's discretion as affected by the mandates of Noe and Rodriguez. Notably, even applying the general rule for continuances:

> **[a] court may not... refuse to grant a**

---

[1] One of those circumstances was that "most importantly, there was strong evidence of Lovett's participation which did not rest on the transcript." 854 F.2d at 1285. This is a mischaracterization of the evidence, as analyzed infra., and also an application of an incorrect appellate basis of analysis.

> **reasonable continuance for the purpose of obtaining defense witnesses where it has been shown that the desired testimony would be relevant and material to the defense.**

Dickerson v. Alabama, 667 F.2d 1364, 1370 (11th Cir.)(emphasis added), cert. denied, 459 U.S. 878, 103 S.Ct. 173 74 L.Ed. 142 (1982).

The continuance sought was not only reasonable, but also necessary to the defense. The government was guilty of a clear and admitted discovery violation and Lovett exercised all possible diligence to obtain the relevant and material scientific evidence. It can only be concluded that the 11th Circuit must have misapprehended the role that the spectrographic evidence would have played at trial: "Lovett was merely precluded from offering cumulative evidence impeaching the transcript..." Id. at 1284.

The attacks on the transcript allowed at trial were vague and ineffective, but the spectrographic analysis would have specifically exculpated Lovett by completely undermining Detective Garcia's recollections as to identity of the participants in the transaction.

What this spectrographic evidence would have been able to prove, and in fact did accomplish after the close of trial, was to demonstrate that each and every statement in the transcript identified as having been made by Lovett was not Lovett. That powerful show of misidentity is far beyond the panel's assumption that a spectrograph would merely confirm certain inaccuracies already set forth. Without the spectrographic analysis, Dr. Truby could not state that Lovett had in fact not spoken in each and every place where he was identified.

The most essential area

misapprehended by the 11th Circuit was its belief that there was "strong evidence of Lovett's participation which did not rest on the transcripts." The government's proof at trial consisted of the eyewitness testimony of Pedro Garcia and a tape recorded body bug worn by that same witness. However, all of Garcia's testimony was linked to the transcript and his identification of voices therein, and was not independent of it as the Opinion states. **In every case where Garcia was cross-examined and his independent recollection was questioned, he deferred to the transcript.** Yet, Garcia's transcript consistently and wholly misidentified Lovett. So the Opinion mistakenly relies on the fact that Garcia testified about someone he named as Lovett in the transcript going to the truck and removing the back panel. However, this same witness was wrong six times out of

six in naming Lovett on tape. Further, no other evidence corroborated Detective Garcia's statement that Lovett drove the truck or stood by the back panel displaying money. No agent of the government in surveillance saw him do this, no agent or arresting agent of the government reported that he was arrested by the truck, no agent reported that he was arrested with the money. No finger prints of Lovett were found on the back panel of the truck. In short, there truly was no independent evidence, outside of the inaccurate transcript in light of Detective Garcia's deferral to the transcript, when his inability to independently identify Lovett became clear.

The inaccurate conclusion that the spectrographic evidence was merely cumulative and impeaching, ignores the importance of the spectrographic evidence

in this case as evidence of misidentity. During the testimony of Dr. Truby, on only one occasion was he able to point to the identification of a person as being incorrect. In that instance, he testified that the identification of Defendant Jones was faulty. Notwithstanding the testimony of Detective Garcia that Jones was present, had negotiated for cocaine, and had directed Lovett to "get the money", Defendant Jones was acquitted on both counts.

In contrast, while Dr. Truby testified that spectrographic evidence would likely confirm his opinion that the transcript was substantially inaccurate, he was totally unable to render any other opinion as to identity during the trial without his spectrographic evidence. That inability was simply due to the fact that many of the speakers were black Southern males and their voices were not as

distinctly separate as the one misidentity he was able to make. Without the spectrographic evidence, Dr. Truby could not know if it was Mr. Lovett, Mr. Jones, Mr. Farmer, Mr. Wright, or a fourth black male, who was never arrested but was initially with the group during negotiations, who was speaking.

It seems self-evident that scientific proof has greater significance than merely cumulative to or impeaching of methods of discrediting evidence which are neither as reliable nor as complete. Further, evidence of total error in identification of an accused made by a star witness is more than merely cumulative and impeaching. This is especially so where the misidentifying witness relies heavily on his inaccurate transcripts and admits to doing so. It is unreasonable to conclude that the jury would have had a reasonable doubt as to Detective Garcia's

ability to know who Joseph Lovett was as opposed to who William Jones, or Samuel Farmer or Mr. Wright was. Had counsel been allowed to prove inability of Detective Garcia to coincide the person Joseph Lovett with his voice, a reasonable doubt would have been raised as to his identification of Lovett. Considering the fact that Defendant Jones was shown to be misidentified in one instance, and was acquitted, one can surmise the likelihood of a different result as to Lovett where Lovett would have been shown scientifically to have been misidentified in every instance.

II. TIME GRANTED FOR CONTINUANCE AS "ONE WEEK" WAS INSUFFICIENT UNDER THE CIRCUMSTANCES AND DID NOT CURE THE GOVERNMENT'S DISCOVERY VIOLATION

In addressing the continuances granted by the trial court to the defendant, the 11th Circuit fails to address the fact that the continuances were required only

due to the faulty discovery supplied to attorneys by the government. The government's faulty discovery left the defense unable to devise, within the time required by the court, a strategy on the basis of the evidence which should have been disclosed pursuant to Rule 16.

It must first be pointed out that the additional time allotted was perhaps a sum of seven days. However, three of those days fell over the long Memorial Day holiday weekend. Defendant's inability to produce the spectrographic evidence needed was not his fault, but rather the fault of the government, and a court continuance which failed to allow the defendant sufficient time to cure the defect was a denial of due process. To deny Lovett the needed testimony and evidence to disprove the charges against him is clearly a violation of constitutional magnitude. This fact was never balanced in

considering the time frame granted to the defendant, although the affidavit of Dr. Henry Truby retraces the diligent actions of counsel to obtain the evidence needed. The Opinion states that Dr. Truby testified about the reliability of Detective Garcia's transcript without the aid of spectrographic analysis. It is urgent for this Court to understand that such testimony was a crippled effort at discrediting some part of the transcripts with the essential needed tools - that being the spectrographic evidence - missing. Dr. Truby's testimony, without his spectrographic analysis, was much akin to a doctor coming to treat a patient without his medical bag. This limited testimony could not advance the truth concerning the essential issue, which was identification of persons, and in specific, of Lovett. Yet, identification in the transcripts was most at issue for

Lovett, was central to Garcia's testimony and, the government's case.

It is also important to note that while the transcripts did not go back to the jury, the jury was exposed to the use of the transcripts while the tapes were played and they saw Joseph Lovett's name placed incorrectly six times on the transcript speaking words of negotiation and inculpation. Surely the effect of the missing spectrographic evidence, which could have shown total error on the part of Garcia, was more than merely cumulative. This was especially so where defense counsel, with the abiding conviction that her client was not on the tape, withdrew her objection to the admission of the tapes attempting to show the total error which only could have been shown through spectrographic evidence. In sum, the period of time for the continuance was not long enough to bring forth essential

evidence for the defense's strategy required under Noe which would have been available had the government properly rendered discovery.

CONCLUSION

In Washington v. Texas, 388 U.S. 12, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967), this Court held:

> **The right to offer the testimony of witnesses... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.**

By offering the denial of Lovett's motion for a brief continuance in

order to counter last minute discovery provided by the government, Lovett was denied due process and a fair trial, as well as the opportunity to present witnesses thus his effective assistance of counsel. Lovett therefore respectfully prays that, in the exercise of its supervisory power, this Court will issue its most gracious Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

DATED this 14th day of February, 1989.

Respectfully Submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Pedro GARCIA, Lazaro Lopez, Jaime Cruz, Joseph Lovett,
Defendants-Appellants.

No. 87-5733.

United States Court of Appeals,
Eleventh Circuit.

Sept. 14, 1988.

Defendants were convicted by jury in the United States District Court for the Southern District of Florida, No. 87-0092-CR-SMA, Sidney M. Aronovitz, J., of conspiring and attempting to possess with intent to distribute more than five kilograms of cocaine, and they appealed. The Court of Appeals, Hill, Circuit Judge, held that: (1) detective's written transcript of tape recording of sale transaction was properly admitted, and defendant was not entitled to additional continuances in order to provide more time for his expert to evaluate tran-

script, and (2) defendant was not entitled to new trial on basis of discovery of results of laboratory analysis of accuracy of that transcript, as that evidence was merely cumulative and impeaching and was not likely to produce different result in new trial.

Affirmed.

1. Criminal Law ⇐438.1

Detective's written transcript of sale transaction which attributed specific statements to particular defendants was admissible in prosecution for conspiring and attempting to possess with intent to distribute more than five kilograms of cocaine; defendant had access to tape recording on which transcript was based well in advance of trial but defense counsel made deliberate tactical decision not to submit own version of transcripts but to focus instead on challenging credibility of detective's transcript. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

2. Criminal Law ⇐614(1)

Narcotics defendant was not entitled

to additional continuances in order to provide time for expert to perform spectrographic analysis of accuracy of detective's written transcript at tape recording of sale transaction; defendant had already been granted brief continuance in order to obtain expert evaluation and additional five days to present defense, and expert testified after listening to tape that spectrogram was likely to confirm certain inaccuracies in transcript, the credibility of which was independently impeached.

3. Criminal Law ⇐911, 1156(1)

Motion for new trial is committed to sound discretion of the district court, and denial of that motion will not be reversed absent abuse of that discretion.

4. Criminal Law ⇐941(2), 942(1), 945(2)

Narcotics defendant was not entitled to new trial on basis of discovery of results of laboratory analysis of accuracy of detective's written transcript of tape recording of sale transaction; that evidence was merely cumulative and impeaching and would not be likely to produce different

Before HILL and ANDERSON, Circuit Judges, and THOMAS *, Senior District Judge.

HILL, Circuit Judge:

In this criminal appeal, we consider whether the admission of a transcript of a tape recorded meeting was error and whether the district court's denial of related motions for continuances and for a new trial was an abuse of discretion. Because we find that the district court's actions were proper, we affirm the convictions of the appellants.

I. FACTS

Detective Pablo Garcia of the Coral Gables Police Department testified at trial to the following events. On February 9, 1987, Garcia, working under cover, received a telephone call from appellant Lazaro Lopez. Lopez requested a meeting the following day and asked Detective Garcia to bring a sample of cocaine. The next morning, February 10, Lopez called to confirm the meeting and he described the

results for variety of reasons, including that reliability of transcript had been questioned at trial, tape itself and not transcript had been submitted to jury for consideration during its deliberations, and there was strong independent evidence of defendant's participation in sale.

Roy J. Kahn, P.A., Miami, Fla., for Garcia.

Lee Weissenborn, Miami, Fla., for Cruz.

Samuel I. Burstyn, Steven I. Taitz, Miami, Fla., for Lopez.

Donald L. Graham, Raskin & Graham, P.A., Miami, Fla., Ellen L. Leesfield, P.A., Coral Gables, Fla., for Lovett.

Dexter W. Lehtinen, U.S. Atty., Anne R. Schultz, Linda Collins Hertz, Harriet R. Galvin, Asst. U.S. Attys., Miami, Fla., for U.S.

Appeals from the United States District Court for the Southern District of Florida.

clothing he would be wearing. At approximately 12:00 noon Detective Garcia and a confidential informant met Lopez at the Hilton Hotel near Miami International Airport. Garcia recognized Lopez by his clothing, and the informant introduced the detective to Lopez. In turn, Lopez introduced Detective Garcia to appellant Pedro Garcia.

The four men sat at a table, and Lopez indicated that he had a client interested in purchasing forty kilograms of cocaine. Detective Garcia stated that the price would be $13,500 per kilogram, which Pedro Garcia agreed was a good price. In addition, there was some discussion of the possibility of exchanging cocaine for speedboats which Pedro Garcia described as "pretty fast." Detective Garcia then went outside with Lopez and showed him a kilogram of cocaine from which Lopez took a small sample. At the conclusion of the meeting, Lopez indicated that he would call

* Honorable Daniel Holcombe Thomas Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

Detective Garcia to set up the next meeting.

Lopez called Detective Garcia at approximately 2:00 p.m. and indicated that he had a client who was interested in purchasing six kilograms of cocaine. Lopez wanted the cocaine delivered, and the detective heard Lopez ask a person named "Jaime" for the delivery address. Prior to the scheduled meeting, however, Detective Garcia contacted Lopez through his beeper and asked to change the location of the transaction to the Hilton Hotel. Lopez was initially uncertain whether his associates would agree, but ultimately the parties agreed to an exchange at the hotel. At approximately 5:50 p.m. Detective Garcia met Lopez in the lobby of the Hilton Hotel. Lopez indicated that his clients were waiting in a Bronco in the hotel parking lot. The two men walked to the parking lot and they were met by appellant Garcia along the way. When they reached the Bronco, Pedro Garcia introduced the detective to appellant Jaime Cruz, who was in the driver's seat of the Bronco, and to appellant Joseph Lovett and co-defendant William

Jones, who were standing beside the vehicle. The detective also saw co-defendant Samuel Farmer in the back seat of the Bronco.

Detective Garcia discussed the exchange with Jones. Pedro Garcia and Cruz told Jones to show the detective the money. Jones then instructed Lovett to get the pickup truck and bring the money. Lovett left the area on foot and returned in a red pickup truck. Detective Garcia got in the truck with Lovett and the two drove approximately seventy-five feet from the Bronco. Lovett instructed the detective to look out the back window of the truck. Through that window Detective Garcia saw Lovett take apart a rear panel of the pickup truck with a screwdriver and remove a clear plastic bag containing a large sum of currency. Farmer then approached the pickup truck and attempted to calm Lovett, who appeared nervous. The detective left the pickup truck and indicated that he was going to get the six kilograms of cocaine from his car. At that point an arrest signal was given, and the defendants were taken into custody.

The appellants, Lopez, Garcia, Cruz, and Lovett, were charged, along with Jones and Farmer, with conspiring (Count I) and attempting (Count II) to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846. Lopez was found guilty on both counts. Pedro Garcia was found guilty on Count I, and the government dismissed Count II when the jury was unable to reach a verdict. Cruz and Lovett were found guilty on Count II and not guilty on Count I. Jones and Farmer were not convicted on either count. Lopez, Garcia, Cruz and Lovett appeal.

II. DISCUSSION

During his meeting with the appellants in the hotel parking lot, Detective Garcia wore a "body bug" through which the conversations surrounding the transaction were recorded. The primary issues in this appeal involve Detective Garcia's written transcript of that recording. Cruz challenges the admission of the transcript at trial, and Lovett challenges the district court's denial of his motions for contin-

uances and for a new trial which were related to the transcript. We conclude that the admission of the transcript was proper and that the denial of Lovett's motions was not an abuse of discretion.[1]

Trial in this case was originally scheduled to commence on May 19, 1987. The defense received the tape recording of the meeting in the hotel parking lot on March 12. Detective Garcia did not, however, begin work on a transcript of the tape attributing specific statements to particular defendants until May 15. The prosecution provided the defense with Detective Garcia's handwritten transcript on May 18, and on May 19 the government provided a typewritten transcript incorporating one substantive change. The change involved attributing the statement "no seguro" to Lopez rather than Lovett, who does not speak Spanish. The district court held a hearing on May 19 and concluded that the tran-

1. In addition to the issues relating to the transcript, the appellants raise a variety of contentions which do not warrant discussion. We have carefully reviewed each of those claims and find them to be wholly without merit.

script would be admitted. However, in response to a motion by Jones and Lovett, the court granted a continuance until 9:00 a.m. on May 21 in order to provide the defendants with an opportunity to obtain an expert analysis of the transcript's accuracy.

On May 20, Lovett's counsel informed the district court that she would need more time to obtain an expert analysis of the transcript because her expert's equipment was in Michigan and Houston, Texas. Lovett's counsel stated that her expert would not be prepared until May 26. The court refused to grant a further continuance. On May 21, Lovett's counsel renewed her motion for a continuance and the court indicated that she would not be required to present Lovett's defense until May 26. Finally, on May 26 Lovett's counsel informed the court that the tapes which Lovett's expert had mailed to his laboratory in Houston had been lost. The district court refused to grant another continuance.

During the trial, Detective Garcia provided direct testimony describing the activities

and conversations which occurred at the meeting in the hotel parking lot. In addition, the tape recording of that meeting was played for the jury. To aid the jury in following the tape, the jurors were provided with Detective Garcia's transcript translating the Spanish into English and identifying the speakers by name. Counsel for the defense cross-examined Detective Garcia on his method of producing the transcript and attacked the reliability and accuracy of his transcript. Attorney Roy Kahn, who represented Pedro Garcia, testified that Detective Garcia had informed him that the quality of the tape was not good and that he could not identify the speakers. While Lovett's expert, Dr. Henry Truby, did not perform a laboratory analysis of the transcript's accuracy before or during trial, he did testify as to inaccuracies in the transcript and he stated that a spectrogram analysis was very likely to reveal inaccuracies in the transcript. The district court instructed the jury that the tape recording itself was the primary evidence and that the reliability of the transcript was for the jurors to determine themselves. Following

the trial, Lovett submitted a motion for a new trial along with an affidavit from Dr. Truby indicating that a laboratory analysis had shown that no statement attributed to Lovett in the transcript was actually made by Lovett. The district court denied that motion.

[1] On appeal, Cruz argues that the transcript should have been excluded. Specifically, he claims that he was improperly prejudiced by the portion of the transcript which reads "Jaime in the background." This phrase was apparently intended by Detective Garcia to indicate that Cruz was making some comment or comments which Garcia could not specifically describe. Cruz argues that this statement in the transcript is extremely unreliable and that it unfairly supported Detective Garcia's testimony regarding Cruz' statements which cannot be discerned from the tape itself. Whether or not this element of the transcript is reliable, we conclude that the transcript was properly admitted by the district court.

Our case law provides district courts

with the authority to allow juries to read properly authenticated transcripts while listening to taped conversations. *See United States v. Onori*, 535 F.2d 938, 947–49 (5th Cir.1976). We have, in fact, established a proper procedure for the production of transcripts as well as for challenges to the accuracy of transcripts:

> [i]nitially, the district court and the parties should make an effort to produce an 'official' or 'stipulated' transcript, one which satisfies all sides. If such an 'official' transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.

United States v. Wilson, 578 F.2d 67, 69–70 (5th Cir.1978). *See also United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985). In this case, while Cruz had access to the tape recording well in advance of the trial, he chose not to submit his own version of a transcript. Instead, the defense focused on challenging the credibility of

Detective Garcia's transcript through cross-examination and other evidence. This was a "deliberate tactical decision," *Cruz*, 765 F.2d at 1023, which the defense was entitled to make. The reliability of the detective's transcript was questioned, the district court instructed the jury to rely primarily on tape rather than the transcript, and the transcript was not submitted to the jury during its deliberations. In these circumstances, the admission of the transcript by the district court as an aid to the jurors was proper.

[2] Lovett does not challenge the admissibility of the transcript, but argues that the district court improperly denied certain motions for continuances which he sought in order to provide more time for his expert's evaluation of the transcript. As an initial matter, we note that "[t]he granting of continuances is left to the sound discretion of the trial judge, and his decision will not be set aside on appeal absent a showing of a clear abuse of that discretion." *United States v. Warren*, 772 F.2d 827, 837 (11th Cir.1985), *cert. denied*, 475 U.S. 1022, 106 S.Ct. 1214, 89 L.Ed.2d

326 (1986). The following factors are considered in evaluating the propriety of the denial of a motion for a continuance:

> the diligence of the defense in interviewing witnesses and procuring their presence, the probability of procuring their testimony within a reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the testimony.

Hicks v. Wainwright, 633 F.2d 1146, 1149 (5th Cir. Unit B January 1981) (quoting *United States v. Uptain*, 531 F.2d 1281, 1287 (5th Cir.1976)). *See also Dickerson v. State of Alabama*, 667 F.2d 1364, 1370 (11th Cir.), *cert. denied*, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). We conclude that the nature of the additional evidence sought in this case, considered in light of the overall circumstances presented to the district court, supports the court's denial of the motions for additional continuances.

While counsel for Lovett initially sought to exclude the transcript, on May 19 she decided that the best course was to seek additional time in order to obtain an expert evaluation of the transcript. The district court granted a continuance until May 21 at 9:00 a.m. for that purpose. When counsel informed the court that the expert evaluation would not be completed until May 26, the court indicated that she would not be required to present her defense until the 26th. Moreover, the court suggested that her defense could be presented out of order if the other defendants had no objection. On May 26, Lovett indicated that the tapes which her expert needed to perform a spectrographic analysis of the accuracy of the transcript were apparently lost in the mail. The district court refused to grant a further continuance at that point, and Lovett's expert, Dr. Truby, testified about the reliability of Detective Garcia's transcript without the aid of a spectrographic analysis.

Lovett argues that the denial of an additional continuance was an abuse of discretion. We disagree. When the defense indicated that it would need time to obtain an

expert evaluation of the transcript, the court granted a brief continuance. When Lovett's counsel indicated that she would need until May 26, the court responded that she would have until the 26th. The district court provided Lovett with a full week to evaluate the accuracy of those portions of the seven page transcript which implicated him. During that time Lovett's expert, Dr. Truby, had an opportunity to hear the tape and evaluate the accuracy of the transcript. He testified that the transcript contained inaccuracies and stated that a spectrogram was very likely to confirm that certain speakers were not the individuals indicated in the transcript. Moreover, counsel for Pedro Garcia offered testimony which impeached the reliability of Detective Garcia's transcript. In addition to this testimony, of course, the defense cross-examined Detective Garcia extensively on the accuracy of his transcript. Thus, the credibility of the transcript was challenged in a variety of ways, and the only effect of the denial of the motions for additional continuances was to deprive Lovett of the opportunity to impeach the credibility of the transcript in

yet another way, through additional testimony by his expert describing a laboratory analysis. This is far from the situation in cases such as *Hicks*, 633 F.2d at 1149, or *Dickerson*, 667 F.2d at 1370, where the refusal to grant a continuance prevented the defense from presenting any testimony at all by a particular witness. In this case, Lovett was merely precluded from offering cumulative evidence impeaching the transcript, and the district court's denial of his motions for additional continuances was not an abuse of discretion.

[3] Following the trial, Lovett filed a motion for a new trial claiming that a spectrographic analysis of the tape recording revealed that the transcript inaccurately attributed six statements made in the parking lot to Lovett. On appeal, he argues that the district court erred in denying that motion. We disagree. A motion for a new trial is committed to the sound discretion of the district court, and we will not reverse the denial of such a motion absent an abuse of discretion. *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir.1985). We have established five elements which must

be present in order to justify a new trial:

> (1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. Bollinger, 796 F.2d 1394, 1401 (11th Cir.1986), *cert. denied*, — U.S. ——, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988). These elements are not present in this case.

[4] The new evidence proffered by Lovett consists of the results of a laboratory analysis of the accuracy of Detective Garcia's transcript. As discussed above, this evidence is merely cumulative and impeaching. The laboratory analysis simply provides an additional method of undermining the credibility of Detective Garcia's transcript which was challenged in other ways. Furthermore, for a variety of reasons this evidence would not be likely to produce a different result in a new trial. First, the

reliability of the transcript was questioned at trial through cross-examination of Garcia and through testimony by Dr. Truby and Pedro Garcia's attorney. Second, the district court instructed the jury that the tape itself, rather than the transcript, was the primary evidence. Consistent with this instruction, the court did not submit the transcript to the jury for consideration during its deliberations. And most importantly, there was strong evidence of Lovett's participation which did not rest on the transcript. At trial, Detective Garcia identified Lovett as the individual who left the group to get the pickup truck containing the money. Garcia testified that Lovett pulled apart a panel of the truck and displayed a large amount of currency for the detective. Given this direct evidence of Lovett's substantial participation in the transaction, it is unlikely that the additional evidence bearing on the reliability of the transcript would result in an acquittal. For these reasons, the district court's denial of Lovett's motion for a new trial was not an abuse of discretion.[2]

III. CONCLUSION

We have reviewed each of the appellants' contentions raised in this appeal and we find them to be without merit. The judgment of the district court is

AFFIRMED.

2. Because we find that the additional evidence offered by the appellant is cumulative, impeaching, and not likely to produce a different result,

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

NO.:87-92-Cr-ARONOVITZ

UNITED STATES,

Plaintiff,

v.

AFFIDAVIT

JOSEPH LOVETT, et. al.,

Defendant.

_____/

1. I am Dr. Henry Truby, Ph.D., Professor of Acoustic Phonetics and Linguistics.

2. I have spent over forty (40) years studying linguistics (the science of language and languages), and specifically Acoustic Phonetics, implicating Voiceprint Identification since the 1960's, growing out of Cryprint Analysis, which I introduced in 1957, and Speechsound Analysis via Spectrogram from 1946.

3. I am a charter member of the International Association of Voice (print) Identification, and have served as chairman of its Board of Directors since 1974. I have trained law enforcement officials and university students in Voiceprinting - the technology of analyzing the visible products of the Speech Spectrograph commonly called Voiceprints.

4. Voiceprints are made on a machine called a Sound Spectrograph. The machine converts sound into visible traces and then prints a read-out of those traces which can be used for comparison purposes between or among different speakers.

5. Everyone's voice is unique, and no one can repeat identically the same word in the same phonetic way, yet such intraspeaker variations are conclusively less than interspeaker variations of the "linguistically same" utterance. Not even identical twins have the same speech (or

even cry) patterns, even though they may sound alike to the human listener.

6. In order to use spectrographic analysis optimally, it is best that the same words allegedly spoken by a suspect be repeated as voice examplars by any speaker under comparison.

7. I have testified for over twenty (20) years in some fifteen (15) states of the United States of America, and in twelve (12) to fourteen (14) Federal Districts, including the Southern District of Florida. Additionally, I have contributed professional assistance variously in twenty-eight (28) states so far and Canada, never failing qualification as an expert, nor to establish admissibility for Voiceprint Identification.

8. Most recently, I was qualified as an expert in the Southern District of Florida in a case before Judge Jacob Mischler.

9. On Tuesday, May 20, 1987, Joseph Lovett visited my office and voluntarily provided appropriate Voice Examplars.

10. Additionally, I was brought by counsel for Joseph Lovett a copied tape recording on which several voices and passages were heard, including, allegedly, the voice of Joseph LOVETT. The next day, I was brought the government's original tape for closer analysis.

11. In addition to the heretofore mentioned tape recording, I was brought a transcript with corresponding passages and assigned voices. (Names were placed by the passages)

12. On this transcript, there were six (6) passages which, according to this transcript, were the voice of Joseph Lovett.

13. The nature of voice examplars and Speech Spectrography is such that in order to readily identify whether

or not a specific voice matches an alleged voice, the words and/or phrases allegedly spoken should be repeated by the testing party.

14. Therefore, the voice examplar which I extracted from Joseph Lovett was a soundtrack of these six (6) passages, with each statement of the six (6) passages repeated several times by Mr. Lovett.

15. On Thursday, May 21st, 1987, the original government tape, and the Examplar tape of Joseph Lovett, were sent to an expediting voiceprint laboratory in Houston, Texas to be transformed into voiceprints for my examination. These tapes were sent off by Express Mail Next Day Service through United States Mail, which guarantees delivery on Sundays and holidays.

16. On Friday, May 22, 1987, the day that these tapes should have arrived, I called the Houston laboratory

and was told that said tapes had not yet arrived.

17. Again, on Saturday, May 23, 1987, and on Sunday, May 24, 1987, I phoned the laboratory and was again informed that the tapes had not been received, nor were they found on Memorial Day, Monday, May 25, 1987. It was later determined that the U.S. Mailclerk had misdelivered the Express Mail packet.

18. I appeared in court before the Honorable Judge Aronovitz on Tuesday, May 26, 1987, and explained that although these tapes had been properly mailed, they had not arrived into the proper hands for analysis at that time.

19. A copy of my postal receipt was made a part of the original record in Court.

20. Later that day, Tuesday, May, 26, 1987, the tapes in question were found in Houston, Texas and I immediately attempted to contact Attorney Ellen

Leesfield through the Office of the Federal Public Defender (this attempt was made at approximately 1:45 p.m.).

21. Since that date, the voiceprints have been received by me from Houston, Texas and a comparison between the voiceprints of the goverment's original tape and the voiceprints voluntarily given by Mr. Lovett were compared.

22. On July 1, 1987, I conveyed to Ms. Leesfield, attorney for Joseph Lovett, the following results:

a. In none of the six (6) passages where the transcript states that Mr. Lovett's voice appears, does Mr. Lovett's voice in fact, appear.

b. Therefore, in my expert opinion, to a reasonable scientific certainty, the voiceprint analysis reflects total error in the transcript which names Joseph Lovett as a speaker in all those places so designated.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

HENRY TRUBY

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

Sworn and subscribed before me this _____ day of _____, 1987.

/S/

Notary Public
State of Florida, at Large

My Commission Expires:

THIS IS A REPRODUCTION OF THE RELEVANT PORTION AN ORDER WHICH WAS FILED IN THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON NOVEMBER 9, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5733

UNITED STATES OF AMERICA,

versus,

PEDRO GARCIA,

LAZARO LOPEZ,

JAIME CRUZ,

JOSEPH LOVETT,

Defendants/Appellants.

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Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 14, 1988, 11 Cir., 19___, _____F.2d_____).

(November 9, 1988)

Before HILL and ANDERSON, Circuit Judges, and THOMAS*, Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/

JAMES C. HILL
UNITED STATES DISTRICT JUDGE

*HONORABLE DANIEL H. THOMAS, SENIOR U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA, SITTING BY DESIGNATION.